UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

International Longshore and Warehouse Union, Bob Flanagan, Ed Ferris, Herman Hampton, Rolando Hernandez, Robert Pohl, Gerardo Serrano, Jesus Villalpando, Ricky Voto-Bernales; Petitioners, v. National Labor Relations Board, Respondent.	Case No. _____

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioners International Longshore and Warehouse Union ("ILWU"), Bob Flanagan, Ed Ferris, Herman Hampton, Rolando Hernandez, Robert Pohl, Gerardo Serrano, Jesus Villalpando and Ricky Voto-Bernales hereby petition the United States Court of Appeals for the Ninth Circuit for review of the order of the Respondent National Labor Relations Board entered on November 18, 2016, which denied Petitioner ILWU's appeal of the Administrative Law Judge's August 29, 2016 and September 7, 2016 orders in cases 32-CA-110280 and 32-CB-118735. Copies of the Board order and the Administrative Law Judge orders are attached hereto. This petition is proper under 29 U.S.C. § 160(f) and Federal Rule of Appellate Procedure 15.

Respectfully submitted,

Dated: April 28, 2017

LEONARD CARDER, LLP

s/ Lindsay R. Nicholas

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA, 94109. On **April 28, 2017**, I served a true and accurate copy of the foregoing **PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD** on all interested parties in this action as follows:

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Executive Secretary
NATIONAL LABOR RELATIONS BOARD
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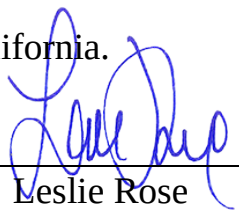
☑ **BY MAIL**: I enclosed the document(s) above in a sealed envelope or package addressed to the persons at the addresses above. Following ordinary business practices, the envelope was sealed with postage fully prepaid and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date at San Francisco, CA.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **April 28, 2017**, at San Francisco, California.



Leslie Rose

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC

and **Case 32-CA-110280**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

and **Case 32-CB-118735**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

ORDER

International Longshore and Warehouse Union's (ILWU) motion for permission to appeal the August 29, 2016 Order of Administrative Law Judge Mary Miller Cracraft approving a non-Board settlement agreement in Case 32-CA-110280 is granted.[1] On the merits, the appeal is denied. ILWU has failed to establish that the judge abused her

[1] For purposes of this proceeding, we assume, without deciding, that ILWU has standing to file a request for permission to appeal.

discretion in approving the settlement.

Dated, Washington, D.C., November 18, 2016

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
LAUREN McFERRAN,	MEMBER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC and/or PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC AND MTC HOLDINGS, INC. AND ITS AFFILIATES AND SUBSIDIARIES, INCLUDING BUT NOT LIMITED TO MARINE TERMINALS CORPORATION, A SINGLE-EMPLOYER

and **Case 32-CA-110280**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

and **Case 32-CB-118735**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

ORDER APPROVING PARTIAL NON-BOARD SETTLEMENT AGREEMENT

The original complaint, issued on December 31, 2014, alleges that Ports America Outer Harbor, LLC, currently known as Outer Harbor Terminal, LLC, referred to here as PAOH, is a *Burns*[1] successor to an obligation to bargain with International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (IAM) by

[1] *NLRB v. Burns Security Services,* 406 U.S, 272 (1972)

taking over in July 2013 performance of marine terminal maintenance and repair (M&R) work from Pacific Crane Maintenance Co., Inc. (PCMC) at berths 20 through 26 at the Port of Oakland, Oakland California (the Port).[2] As a *Burns* successor, PAOH is alleged to have violated Section 8(a)(5) and (1) of the Act by refusing to recognize the IAM and 8(a)(2) and (1) by instead recognizing International Longshore Workers Union (ILWU). The original complaint also alleged that PAOH was a *Golden State*[3] successor. The complaint further alleged that ILWU violated Section 8(b)(1)(A) and 8(b)(2) of the Act by accepting assistance and exclusive recognition even though it never represented an uncoerced majority of employees in the bargaining unit.

These allegations were built on a prior decision of the NLRB[4] in which the Board held, inter alia, that PCMC and Pacific Marine Maintenance Company, LLC (PMMC) violated the Act by withdrawing recognition from IAM and by recognizing ILWU and applying the terms of the Pacific Maritime Association (PMA) contract with ILWU to the employees performing the marine terminal M&R work at various locations including berths 20 through 24 at the Port.[5] The Board also found that ILWU violated the Act by accepting recognition from PCMC/PMMC and agreeing to apply the PMA-ILWU agreement including union-security provisions at a time when it did not represent an uncoerced majority of employees and when IAM was the exclusive representative of the employees.[6]

Hearing commenced in Oakland, California on October 19, 2015, and is ongoing. On February 1, 2016, PAOH, under the name of Outer Harbor Terminal, LLC, filed a voluntary petition for bankruptcy in Case 16-10283-LSS currently pending in the United States District Court for the District of Delaware. On February 10, 2016, the General Counsel moved to file an amended consolidated complaint. This motion was granted.

On March 11, 2016, the second amended consolidated complaint issued adding an alternate theory that MTC Holdings (MTCH) and its affiliates and subsidiaries, including but not limited to Marine Terminals Corporation (MTC), are a single employer with PAOH and *Burns* and *Golden State* successors to the obligation to bargain with IAM and remedy past violations. In April 2016, PAOH ceased doing business.

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[2] IAM filed the charge and amended charge in Case 32-CA-110280 on July 30 and September 19, 2014, respectively. IAM filed the charge in Case 32-CB-118735 on December 6, 2014.

[3] *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

[4] *PCMC/Pacific Crane Maintenance Co.*, 362 NLRB No. 120 (2015)(*PCMC II*), reviewed de novo the vacated decision in *PCMC/Pacific Crane Maintenance Co.*, 359 NLRB No. 136 (2013) (*PCMC I*), and in agreement with the rationale set forth in the vacated decision, adopted it. This Board decision is currently on review in the D.C. Circuit Court of Appeals.

[5] In August 2007, with notice of PCMC's potential unfair labor practice liability, Pacific Crane Maintenance Co., LP (PCMC LP) purchased the business and assets of PCMC and continued to operate the business in essentially the same form. The Board held that PCMC LP was jointly liable for the unfair labor practices of PCMC/PMMC pursuant to the parties' stipulation that PCMC LP was a successor employer. *PCMC I*, slip op. at 2, fn. 3.

[6] IAM filed the unfair labor practice charge against ILWU at issue in this case on December 11, 2014. The complaint, issued on December 31, 2014, was amended prior to and at the hearing.

On various dates in August 2016, PAOH, MTCH, MTC, and IAM executed a Partial Non-Board Settlement Agreement (Exhibit 1). ILWU is not signatory to the settlement agreement. Thus, even assuming approval of the settlement agreement, this litigation will continue as to the complaint allegations that ILWU violated Section 8(b)(1)(A) and 8(b)(2). PAOH, MTCH, and MTC do not admit to engaging in any of the actions alleged in the unfair labor practice proceedings nor do they admit to any unfair labor practices or any other type of wrongdoing.

Terms of the Settlement Agreement

The settlement agreement is conditioned on the following:

1) NLRB's withdrawal of the amended consolidated complaint issued March 11, 2016, which added MTCH and MTC under the alternate single employer theory; reverting to the original complaint of December 31, 2014, which does not include MTCH and MTC or the alternate single employer pleading.
2) NLRB's acceptance of the settlement agreement as to MTCH and MTC as a full settlement.
3) NLRB's approval of all other steps necessary to terminate the litigation as to MTCH and MTC and to termination of any and all financial obligations of PAOH.
4) Releases from the Machinists' Health and Pension Funds from all claims those funds may have against PAOH, MTCH, and MTC.
5) Withdrawal with prejudice by IAM of the grievance dated August 18, 2010, against "Ports America" for illegally transferring bargaining unit work.
6) Entry by the bankruptcy court of a final, nonappealable order approving the settlement agreement and the payment by PAOH of its portion of the settlement amount.

The settlement agreement excludes all claims that PAOH is a *Burns* successor to PCMC/PMMC at berths 20-26 at the Port. Thus, if the settlement agreement is approved, the *Burns* successorship allegation as to PAOH will remain for determination.

The settlement agreement provides that releases executed with the agreement[7] apply only to the claim that MTCH and MTC were either *Burns* or *Golden State* successors or a single employer with PAOH and any claim that PAOH was a *Golden State* successor to PCMC/PMMC. Thus, the settlement agreement states that PAOH recognizes that the Board may ultimately find that it was a *Burns* successor. However, the settlement agreement provides that PAOH will have no financial liability to remedy any such finding. It will only be obligated to post/mail notices. By virtue of the settlement agreement, PAOH will have no obligation or responsibility to pay any back pay, benefits, dues money or other financial obligation as a result of the continued litigation of this case.

The settlement amount is $3 million. The trustees of the Machinists' Health and Pension Funds will receive $943,121.05. M&R employees in the bargaining unit will receive $1,904,999.90. Of that amount, $45,000 will be paid to 37 individuals -- 35 who were on the

[7] The release language is set out in the settlement agreement, pp. 4-8.

PAOH list as of July 1, 2015 and 2 individuals who were employed by PCMC but not hired by PAOH. $14,642.84 will be paid to each PCMC/Transbay mechanic who was employed by PCMC but who did not go to PAOH because of retirement, employment at TraPac, or death; and $5,000 to 7 PMMC employees who were not hired by PCMC and chose thereafter to retire. Recipients of the settlement monies are solely responsible for any taxes.

No portion of the settlement amount may be utilized to satisfy any claim for dues which may ultimately be found to have been unlawfully paid to the ILWU. The settlement amount does not include reimbursement for any dues money paid to the ILWU that was not paid to the IAM. The settlement does, however, relieve MTCH/MTC and PAOH from responsibility to reimburse such dues.

Finally, IAM will receive $151,871.05 as legal fees and expenses incurred in this matter. IAM letters of August 4 (Exhibit 2) and August 16, 2016 (Exhibit 3), indicate that $151,871.05 would be allocated to IAM for legal fees and expenses. The letter of August 16 adds that IAM has also lost dues payable pursuant to dues check-off authorizations and "part of this money [that is, part of the $151,871.06] is to recompense [IAM] for those lost dues checkoff." No specific amount is referenced in the August 16 letter for lost dues. The itemized legal fees on the attachment to the August 16 letter totals the entire amount at $151,871.05.

The settlement agreement specifically excludes IAM lost dues. Thus, the August 16 letter must be read to indicate that lost dues were a motivational factor for including fees and expenses to the IAM as part of the proposed settlement. Consistent with this reading of the August 16 letter, in its filing of August 23, 2016, IAM indicated that it calculated the amount of lost dues is $808.437.50.[8] This amount is not part of the proposed settlement agreement and, in fact, there is no amount for lost dues in the settlement agreement.

General Standard for Reviewing Settlement Agreement

In *Independent Stave Co.*, 287 NLRB 740, 743 (1987), the Board stated,

> It is, of course, impossible to anticipate each and every factor which will have relevance to our review of non-Board settlement agreements. At this juncture, we find it unnecessary to provide an exhaustive list of all the factors which may become relevant in individual cases. Generally, however, in evaluating such settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound; and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation;

[8] IAM explained that the loss was approximately $125 per employee per month or a total of $4375 per month for 152 months equaling $665,000 in unreimbursed dues for 35 employees. Other employees covered by the settlement agreement had unreimbursed dues in the amount of $105,187.50. The total unreimbursed dues is thus $808,437.50, according to IAM.

(3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Positions of the Parties

Following execution of the Settlement Agreement, all parties were requested to file briefs stating their position with regard to approval or disapproval of it. In general, the General Counsel acknowledged the inherent risks of litigation and an understanding that the settlement would provide some immediate remedy for affected employees from an entity in bankruptcy. Specifically, the General Counsel stated no objection to distribution of $943,121.05 to the trustees of the pension plan even though this was only a fraction that might be owed if the General Counsel was successful in proving the *Golden State* and *Burns* theories of liability. Following an August 4 explication from IAM (Exhibit 2) about the method for calculation of individual employee distributions, the General Counsel stated it had no objections to the allocations. Further, the General Counsel stated no objection to the agreement's relieving PAOH and MTCH and MTC of any obligation to reimburse employees for ILWU membership dues.

Nevertheless, the General Counsel objects to the portion of the settlement allocation payable to the IAM as legal fees and expenses because there is no explanation or legal authority cited for the inclusion of settlement money to cover legal fees and expenses. Further, the General Counsel notes that in *PCMC I*, the Board cut off reimbursement of dues to the IAM at expiration of the parties collective-bargaining agreement on March 31, 2005.[9]

ILWU, although not a party to the proposed settlement, objects to it as repugnant to the Act, encompassing arbitrary distributions of monies and baseless factual assumptions. Thus ILWU avers that the releases to be signed by the parties are not in evidence. Although the ILWU agrees that IAM provided information about proposed distribution of the settlement amounts, the ILWU claims the agreement gives the IAM "unfettered discretion" in how and to whom to distribute the money because the August 16, 2016 letter is not binding. Further, ILWU argues that the payment of legal fees and expenses has no basis in law. Finally, ILWU claims that the scope of the ongoing prosecution of the remainder of the case is unworkable and illogical.

MTCH and MTC claim that the settlement agreement fully satisfies the necessary elements of *Independent Stave*. First, the charging party IAM and all employer Respondents have agreed to the settlement and the General Counsel's reservations to the settlement are minimal. Second, the settlement is exceedingly reasonable in light of the allegations, the current posture of the litigation, the reasonably estimated chance of recovery, and the fact that PAOH has filed for bankruptcy and ceased operations. In this respect, MTCH and MTC note that the

[9] Extant law at the time held that on expiration of a collective-bargaining agreement, an employer was no longer obligated to honor dues check-off authorizations. *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). *Bethlehem Steel* was overruled in *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). However, the Board held in *Lincoln Lutheran* that its decision would apply prospectively only.

allegations are derivative in nature as none of the employer Respondents were involved in the *PCMC* litigation from which the current litigation derives. MTCH and MTC also opine that the risk of loss for the IAM is great because the *Golden State* theory is only supported by scarce and indeterminate facts while the single employer theory is highly speculative. Thus, considering the risk of litigation, MTCH and MTC assert that the substantial amount to be paid under the settlement represents "an exceedingly reasonable fraction of estimated liability." MTCH and MTC note no fraud, coercion, or duress has occurred in reaching the settlement. Finally, MTCH and MTC state that there is no history of breaching prior settlement agreements.

Analysis

The Charging Party and the employer Respondents have agreed to be bound by the proposed settlement. With one reservation, discussed below, the General Counsel does not object to the settlement agreement. There is no issue regarding fraud, coercion or duress. There is no history of breach of prior settlement agreements. Further, it must easily be concluded that the settlement is reasonable in light of the nature of the violations, risks inherent in litigation, and the stage of the litigation. The bankruptcy proceedings and PAOH's cessation of business are only one factor in this calculus. Another is the "early"[10] stage of this proceeding, after 14 days of litigation. Further, numerous trial rulings regarding amendment of the complaint and inclusion of MTCH and MTC as a single employer with PAOH might be reviewed and possibly reversed. These are the typical risks inherent in litigation. All of these factors combined result in the conclusion that this settlement is quite reasonable under all of the circumstances.

As mentioned, the General Counsel does not object to the bulk of the proposed settlement but objects generally to the settlement agreement's inclusion of attorneys' fees and expenses[11] stating, "Accordingly, and noting the complete absence of any legal authority or justification for allocating any part of the settlement money to attorney's fees and other unexplained expenses, Counsel for the General Counsel objects to any such allocation."

Ordinarily, attorneys' fees are requested when a charging party has been required to hire an attorney to defend an unlawful lawsuit[12] or when an employer's defense is "frivolous"[13] or there is "flagrant, aggravated, persistent, and pervasive employer misconduct."[14] Additionally, in appellate proceedings, the Board seeks litigation costs.[15] However, no attorneys' fees have been sought here. Thus, the General Counsel argues in essence that inclusion of attorneys' fees as a component in the settlement agreement does not effectuate the purposes of the Act. In disagreement, it is found that the legal fee component of the settlement agreement is an

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[10] The underlying *PCMC* litigation began in March 2005 and is currently ongoing.
[11] Although in one document, IAM stated that the only expense was one trip by a business agent to Seattle, such expense is not set out in supporting documents. The only amounts reported are attorneys' fees. The inference to be drawn is that only attorneys' fees are built into the settlement.
[12] See, e.g., *Convergys Corp.*, 363 NLRB No. 51 (2015)
[13] *Electrical Workers (IUE) (Tildee Prods.) v. NLRB*, 426 F.2d 1243, reh'g denied, 431 F.2d 1206, (D.C. Cir.), cert. denied, 400 U.S. 950, 75 LRRM 2752 (1970), on remand, 194 NLRB 1234 (1972), enfd. as modified, 502 F.2d 349 (D.C. Cir.), cert. denied, 417 U.S. 921 (1974), 421 U.S. 991 (1975).
[14] *J.P. Stevens & Co.*, 244 NLRB 407 (1979), enf 668 F.2d 767 (4th Cir. 1982).
[15] See, *Teamsters Local 901 (F.F. Instrument Corp.)*, 210 NLRB 1040 (1974).

insufficient ground for finding the settlement agreement as a whole does not effectuate the purposes of the Act. The amount, about 5 percent of the total, is adequately documented. Although no party cites any authority precluding attorneys' fees in an NLRB settlement, the reverse is also true.[16] Thus, this inclusion, resulting from the give and take of negotiation of the settlement, appears reasonable and furthers the Board's important and well-established policy regarding encouragement of settlements.[17]

Having fully considered this matter, I find that the *Independent Stave* factors have been fully satisfied under the particular circumstances of this case and that it would effectuate the purposes of the Act to approve the settlement.[18] Accordingly, the Partial Non-Board Settlement Agreement is hereby approved.

SO ORDERED
August 29, 2016

Mary Miller Cracraft
Administrative Law Judge

Served by facsimile:

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[16] In *Flyte Tyme Worldwide*, 362 NLRB No. 46 (2015), attorneys' fees were included in the settlement agreement and were not the reason that it was set aside. It is unclear if the fees were related solely to a class action wage and hour suit that was also the subject of the settlement.
[17] See, e.g., *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016); *McKenzie Willamette Medical Center*, 361 NLRB No. 7, slip op. at 3 (2014).
[18] Although the ILWU is not party to the settlement agreement, it objects to it. The ILWU's objections, in general, involve matters such as pension reimbursement and employee backpay which do not impinge the ILWU. The single matter which will have an effect on the ILWU is whether further litigation of this case can take place if the settlement is approved. It appears that such litigation will face no difficulties. Thus, this argument is rejected.

EXHIBIT 1

SETTLEMENT AGREEMENT

This is a Settlement Agreement ("Agreement") by and among Outer Harbor Terminal, LLC (formerly known as Ports America Outer Harbor, LLC) ("OHT"), MTC Holdings ("MTC-H") and Marine Terminals Corporation ("MTC"), *for themselves, their affiliates, and related entities,* (collectively "Companies") on one hand, and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, and Local Lodge 1546 (collectively, "the Machinists"), on the other hand, and is dated as of July 21, 2016. This Agreement resolves fully and finally all the Machinists' financial (including all forms of compensation, benefits, or interest) claims arising in any forum or based on, arising from or related in any way to the National Labor Relations Board ("NLRB") unfair labor practice charge designated 32-CA-110280 ("ULP Charge") (including without limitation the remedies sought) or the events that gave rise to the ULP Charge. In addition, this Agreement will settle all claims that Machinists' benefit and pension funds may have against Companies, or other Released Parties as defined in paragraph (c) below, arising from or related in any way to the ULP Charge or the events that gave rise to the ULP Charge; including but not limited to claims for withdrawal liability.

(a) Conditions:

This Agreement is conditioned upon the NLRB's withdrawal of the Amended Consolidated Complaint issued March 11, 2016, and the NLRB's reversion to the Consolidated Complaint issued December 31, 2014 which alleges OHT as the only Respondent employer. This Agreement is conditioned upon the NLRB's accepting this settlement as to MTC-H and MTC and accepting this settlement as fully effectuating the purposes of the National Labor Relations Act, as amended, and approving the other steps necessary to terminate the litigation as to MTC-H and MTC and to any and all financial obligations of OHT. This settlement does not include

any claims in the remaining Consolidated Complaint Dated December 31, 2014 or any amendments thereafter that OHT was a *Burns* Successor to PCMC/PMMC at Berths 20-26 at the Oakland Out Harbor. The release includes a release of any claim that MTC or MTC-H was either a *Burns* or *Golden State Bottling* Successor or a single employer with OHT, or that OHT was a *Golden State Bottling* Successor to PCMC/PMMC. OHT recognizes that the Board may find that it was a *Burns* Successor and may have to post a notice or mail a notice to former employees or take other remedial action which does not impose any financial obligation. OHT will have no obligation or responsibility to pay any back pay, benefits, dues money or another financial obligation whatsoever as a result to the continuation of the litigation Case 32-CA-110280.

Nothing in this Agreement shall be construed as preventing or limiting in any way the ability of Counsel for the General Counsel and the Machinists to litigate, or the All and or NLRB from deciding through final decision the allegations that at all times material since July 1, 2013 OHT was a *Burns* Successor to PMMC/PCMC; that at all times material since July I. 2013, the unit described in Paragraph 8(c) of the Consolidated Complaint issued December 31, 2014 ("Ports America Unit") was a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; that at all times material since July 1, 2013. based on Section 9(a) of the Act, the Machinists have been the exclusive collective bargaining representative of the Ports America Unit; that on June 27, 28 and July 30, 2013 the Machinists requested OHT to recognize the Machinists as the exclusive collective bargaining representative and to bargain with it as the exclusive collective bargaining representative of the Ports America Unit; that since July 1, 2013 OHT has failed and refused to so recognize the Machinists as the exclusive representative of the Ports America unit; and has instead recognized the ILWU even though the 1LWU never represented an uncoerced majority of the employees in the expanded

PMMC/PCMC unit; and that since July 1, 2013 OHT has applied to the employees of the Ports America unit the terms and conditions of employment of the PMA-ILWU Agreement, including its union security provisions.

In addition, this Agreement is conditioned upon each and all of Machinists' Health and Pension Funds (defined below) releasing the Released Parties (defined below) from all claims that those funds may have against the Released Parties based on, arising from or related in any way to the ULP Charge (including without limitation the remedies sought pursuant to the ULP Charge), and the events that gave rise to the ULP Charge or which pre-dated the ULP charge, including but not limited to any claims for withdrawal liability arising under contract or under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The term "Machinists Health and Pension Fund" means each "employee welfare benefit plan" and "employee pension benefit plan" as defined under Section 3 (1. 2 and 3) of ERISA, including but not limited to any "multiemployer plan" within the meaning of Section 3(37)(A) or 4001(a)(3) of ERISA, to which any Released Party has or ever had an obligation to contribute on behalf of any present or past employee represented by the Machinists. This Agreement also is conditioned on the Machinists withdrawing, in writing and with prejudice, the grievance filed against Companies dated August 18, 2010 ("Grievance"). The Machinists expressly agree not to raise any claims that are in any way related to the claims made in the Grievance. This Agreement also is conditioned on the entry by the United States Bankruptcy Court for the District of Delaware presiding over the bankruptcy case of OHT Case No. 16-10283 (LSS) ("Bankruptcy Case"), of a final, nonappealable order that is not subject to any stay or reversal approving this Agreement, including, but not limited to, the payment by OHT of its portion of the Settlement Amount set forth in Section b below. If any of these conditions is not met, this Agreement shall be null and

void and of no effect. The Effective Date of this Agreement shall be the date upon which the last of these conditions has been satisfied.

(b) Settlement Amount:

Companies will pay $3,000,000 (THREE MILLION DOLLARS), as the total gross settlement payment, $925,000 (NINE HUNDRED TWENTY-FIVE THOUSAND) of the total to be paid by OHT. The settlement payment will be allocated to such payees as the Machinists may designate, provided that the payees have a good faith claim of loss. It is further provided that no part of the Settlement Amount shall be utilized to satisfy any claim for dues which may ultimately found to have been unlawfully paid to the ILWU and the Settlement Amount does not include reimbursement for any dues money paid to the ILWU or which was not paid to the Machinists. The settlement does however relieve OHT, MTC-H and MTC of any responsibility to reimburse such dues. The $3 Million shall be the total amount payable by Companies. The recipients of this money shall be solely responsible for taxes, if any, due because of the receipt of said money. The $3 Million will be paid by Companies within fourteen days of the Effective Date. The full amount will be paid to the Trust Account of Weinberg, Roger & Rosenfeld.

(c) Release:

The Machinists, for themselves, their parent and related organizations, and on behalf of all their present and past members, present and past employees represented by the Machinists, and past and present Machinists benefit funds that are not Machinists Health and Pension Funds finally waive and release all known and unknown Claims against the Released Parties (defined below). The "Claims" consist of any and all claims, counterclaims, rights, demands, debts, damages, losses and liabilities, including, but not limited to, any and all claims, expenses or

proofs of claim (regardless of their nature or priority) filed or asserted in the Bankruptcy Case, based on, arising from or related in any way to the ULP Charge (including without limitation the remedies sought pursuant to the ULP Charge) or the events that gave rise to the ULP Charge. With respect to the Claims, the Machinists waive the protection of California Civil Code Section 1542, which states:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

The "Released Parties" are Outer Harbor Terminal LLC; MTC Holdings; Marine Terminals Corporation; Ports America Group, Inc.; together with all of their current and former direct and indirect owners, members, divisions, parents, subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates, and their respective current and former direct and indirect owners, members, divisions, parents; subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates and with respect to each of them, their predecessors and successors; and with respect to each such person or entity, all of its past, present, and future employees, officers, directors, stockholders, members, managers, owners, divisions, representatives, assigns, advisors, attorneys, agents, lenders, sureties, insured and insurers; and any other persons acting by, through, under or in concert with any of the persons or entities listed in this section; and any such persons' or entities' successors, as well as each such person or entity related to a Released Party ("Related Party"). Without limiting the generality of the foregoing, in addition, the Released Parties also specifically include, but are not limited to Terminal Investments, Limited SA, HHH Oakland, Inc., for themselves, their affiliates, and

related entities. The release does not include PCMC/PMMC or any related entity.

OHT, on behalf of itself and each of its Related Parties, finally waives and releases all known and unknown Claims against Ports America. The "Claims" consist of any and all claims, counterclaims, rights, demands, damages, losses, debts and liabilities, including, but not limited to, any and all claims, expenses or proofs of claim (regardless of their nature or priority) filed or asserted in the Bankruptcy Case, based on, arising from or related in any way to the ULP Charge (including without limitation the remedies sought pursuant to the ULP Charge) or the events that gave rise to the ULP Charge. With respect to the Claims, OHT waives the protection of California Civil Code Section 1542, which states:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

"Ports America" for the purpose of this release by OHT are MTC Holdings; Marine Terminals Corporation; Ports America Group, Inc., together with all of their current and former direct and indirect owners, members, divisions, parents, subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates, and their respective current and former direct and indirect owners, members, divisions, parents, subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates and with respect to each of them, their predecessors and successors; and with respect to each such person or entity, all of its past, present, and future employees, officers, directors, stockholders, members, managers, owners, divisions, representatives, assigns, advisors, attorneys, agents, lenders, sureties, insured and insurers; and any other persons acting by, through, under or in concert with any of the persons or entities listed

in this section; and any such persons' or entities' successors and Related Parties. Without limiting the generality of the foregoing, in addition, the Released Parties also specifically include, but are not limited to Terminal Investments, Limited SA, HHH Oakland, Inc., for themselves, their affiliates, and related entities.

Ports America, on behalf of itself and each of its Related Parties (defined below), finally waives and releases all known and unknown Claims against OHT The "Claims" consist of any and all claims, counterclaims, rights, demands, debts, damages, losses, and liabilities including, but not limited to, any and all claims, expenses or proofs of claim (regardless of their nature or priority) filed or asserted in the Bankruptcy Case, based on, arising from or related in any way to the ULP Charge (including without limitation the remedies sought pursuant to the ULP Charge) or the events that gave rise to the ULP Charge. With respect to the Claims, Ports America waives the protection of California Civil Code Section 1542, which states:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

OHT for the purpose of this release by Ports America are Outer Harbor Terminal LLC; together with all of its current and former direct and indirect owners, members, divisions, parents, subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates, and their respective current and former direct and indirect owners, members, divisions, parents, subsidiaries, brother-sister companies, and other related companies, partnerships, joint ventures, joint venturers and other affiliates and with respect to each of them, their predecessors and successors; and with respect to each such person or entity, all of its past, present, and future employees, officers, directors, stockholders, members,

managers, owners, divisions, representatives, assigns, advisors, attorneys, agents, lenders, sureties, insured and insurers; and any other persons acting by, through, under or in concert with any of the persons or entities listed in this section; and any such persons' or entities' successors and Related Parties. Without limiting the generality of the foregoing, in addition, the Released Parties also specifically include, but are not limited to Terminal Investments, Limited SA, HHH Oakland, Inc., for themselves, their affiliates, and related entities.

(d) Non-Admission of Any Wrongdoing

By entering into this Agreement, the Released Parties do not admit to engaging in any factual allegations arising from or related in any way to the ULP charge, nor do they admit to any unfair labor practices or any other type of wrongdoing.

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[Signature pages omitted]

EXHIBIT 2

August 4, 2016

Letter from Charging Party Attorney to All Parties.

[Letterhead and Inside Addresses Omitted]

Re: Proposed Distribution of PAOH Settlement Money

Persons:

The Charging Party proposes to distribute the proceeds from the settlement as follows:

To the Trustees of the Automotive Industries Pension Fund, $943,129.05.

To various employees in the bargaining unit who were discriminated against or otherwise suffered adverse consequences the amount of $1,904,999.90. The distribution is as follows:

$45,000 to 35 people who were on the PAOH list of July 1, 2015 and two discriminatees of PCMC who were also not hired by PAOH (total of 37); $14, 642.85 to PCMC/Transbay mechanics who were employed by PCMC but who did not go to PAOH because of retirement, employment at TraPac or death; and $5,000 to 7 PMMC employees who were not hired by PCMC and chose thereafter to retire.

Finally, the amount of $151,871.05 to the Charging Party as legal fees and expenses incurred in this matter.

The total is $3,000,000.

This should provide the ILWU and the General Counsel with sufficient information to approve the proposed settlement.

The monies will be paid to our Trust Account. We will provide Form 1099s to each employee who receives a distribution. Each employee will have to execute a W-9 form before the distribution can be made, so that we can prepare the appropriate tax documents.

If you have any questions, please let me know.

[Signature Block and ccs omitted]

EXHIBIT 3

August 16, 2016

Letter to Region 32 from Charging Party Attorney

[Letterhead and inside address omitted]

Dear Ms. Hardy-Mahoney:

I am writing this letter to you in response to questions that have been raised by the Region with respect to the proposed distribution of the $3,000,000 settlement.

Let me make something very clear. That settlement is a small portion of what would be achieved if the Region were to prevail on the claim against MTC. If, however, the claim fails against MTC, there will be nothing in all likelihood that is recovered because of the bankruptcy of PAOH. In fact, that bankruptcy will undoubtedly be wound up soon and there would be nothing left in the estate. As you are aware from the proposed settlement, the bankruptcy estate will be paying a portion of the settlement which, in our view, is a significant victory. MTC is apparently paying the rest of the settlement.

The settlement, moreover, does not disturb that portion of the complaint which remains against POAH that it is a successor to PCMC. There is no money involved in that claim, but rather it is a matter of principal to preserve the representation rights of the Charging Party. Neither MTC nor POAH has any issue with that. Moreover, most of that case has been completed and it is very likely that, upon acceptance of the settlement, little will be left to be litigated.

In summary, this settlement achieves a very important goal of the Charging Party and we believe the Region. It preserves the basic theory of the General Counsel's complaint and puts a substantial amount of money in the hands of workers who were adversely affected by the conduct PCMC and PAOH.

Nonetheless, we have attached a chart which shows the precise names of individuals and how much they will receive. Since a copy is being sent to all counsel, we are asking that they advise their clients not to discuss this with any these individuals who will receive settlements. If we learn of any such discussion or any inappropriate conduct, we will ask the Region to take appropriate action.

Of the $3,000,000 we have proposed to split that money as follows:

First, $943,121.05 will be paid to the Trustees of the Automotive Industries Pension Plan. This is contingent upon the Automotive Industries approving this payment which we believe will occur. The Trust will have to execute a waiver to MTC and PAOH. This will provide further pension benefits. To be clear, by no means will this pay, in any regard, for the pension benefits which would have accrued throughout the period 2005 to 2013.

There are 35 workers who were on the PAOH list who were hired as of July 1, 2013, when it began operation. Those 35 remained still working at the time of the closure. They were among the most senior employees working for POAH, but that seniority arose in almost all respects because of the seniority date from 2005 when PCMC took over the work from PMMC. Some of them had a later seniority date because they transferred from Transbay when the Transbay terminal was absorbed by PMOMC. That list of 35 of those employees is attached. In addition to those 35 employees, there are 2 employees who will receive the same amount as the 35. Those employees are Howard Parker who became disabled and Jarred Laign who was never hired by PCMC and who is entitled, theoretically, the back pay for the entire period.

The Union proposes to pay each of them $45,000 of the settlement. Each of them is entitled to substantially more in back pay should this case be completed. Each of them would be entitled to substantial additional vacation pay, overtime, potentially some medical expenses which is not covered by the ILWU plan and additional pension benefits. $45,000 does not come close to paying what each of them is owed.

The Charging Party does not have any specific information other than the knowledge of the difference between what they worked under the ILWU contract, from what they would have earned under the Machinists contract. Those differences are mentioned above.

In addition to those 37, there were 14 employees who were former PMMC or Transbay mechanics who were hired by PCMC or Transbay mechanics who were hired by PCMC, but did not go to work for PAOH due to three reasons: (1) retirement; (2) employment at TraPac, or (3) death. The Charging Party proposes to pay them substantially less. Each will receive $14,642.85. Attached is a list of those people with the categories in which they fall.

In addition, there were 7 PMMC employees who were never hired by PCMC, but chose to retire at that time or later. The Union proposes a small payment to them in the amount of $5,000. That list is attached. To be clear, these individual would have continued with work in all likelihood for a substantial period of time after April 1, 2005. $5,000 is a very small amount to pay them.

Finally, the Union proposes to pay legal fees and other expenses as mentioned in the attachment.

In addition to the fees and expenses, many of the members had executed dues check-off authorizations. Those dues would have been remitted to the Charging Party and part of this money is to recompense the Charging Party for those lost dues check-off. However, I want to be clear that this settlement does not include those dues which were paid to the ILWU. Those are subject to a separate claim against the ILWU. As the Region is aware, the Board has approved settlements between parties where there is a joint liability and one of the parties pays a portion of this back pay or other amounts owed, leaving the other party to pay the remainder. See *Urban Laboratories* 305 NLRB 987-988 (1991). This case is

premised upon the Supreme Court's decision in *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969).

This settlement would not in any way effect a double recovery. The amounts being paid to the Union are for dues check-off. The amounts to be reimbursed by the ILWU are for dues which were unlawfully required to be paid to the IIMU. Those payments with interest are owed to the workers.

We understand that the Region has raised several questions. They are, first, none of this money goes to anyone who worked in Tacoma. Second, the Charging Party does not know the total number of employees who worked during the back pay period. That would be information solely in the possession of PCMC and/or the Pacific Maritime Association. We do know the names of the mechanics who worked at PMMC or Trans Bay, and those are listed.

• You have asked for the names of those employees who will receive nothing. As indicated above, that information is not in possession of the Charging Party.

We do know from information provided by PAOH that there were 516 employees who worked at least one shift at PAOH from its opening until it closed.

We believe that there is a rational basis for these allocations. That makes sense given the relatively small amount that is being paid in comparison to the larger amount which is owed.

The Region is also reminded that the case against PCMC remains in litigation. It is possible that there would be additional recovery through that litigation, but at this point that potentially is a very long way off.

In summary, we urge the Region to accept this as a reasonable settlement and rational distribution of that settlement.

[Signature Block and CCs to all parties omitted]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC and/or PORTS AMERICA OUTER HARBOR, LLC, CURRENTLY KNOWN AS OUTER HARBOR TERMINAL, LLC AND MTC HOLDINGS, INC. AND ITS AFFILIATES AND SUBSIDIARIES, INCLUDING BUT NOT LIMITED TO MARINE TERMINALS CORPORATION, A SINGLE-EMPLOYER

and **Case 32-CA-110280**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

and **Case 32-CB-118735**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

ORDER GRANTING MOTION FOR RECONSIDERATION AND DENYING ON THE MERITS

In *PCMC,* 362 NLRB No. 120 (2015), the Board held, inter alia, that in 2005 Pacific Crane Maintenance Company, Inc. (PCMC) violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from International Association of Machinists and Aerospace Workers, District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC (IAM). In this case, the amended, consolidated complaint alleges that Ports America Outer Harbor (PAOH), MTC Holdings

(MTCH), and its affiliates and subsidiaries including but not limited to Marine Terminals Corporation (MTC) are *Golden State*[1] successors of PCMC. As a remedy, the General Counsel seeks an order that PAOH, MTCH, and MTC be required to remedy the unfair labor practices of PCMC.

Hearing commenced on October 12, 2015, and is ongoing. PAOH filed for voluntary bankruptcy in early 2016. On various dates in August 2016, IAM, PAOH, MTCH and MTC executed a partial non-Board settlement agreement. After briefing of all parties, on August 29, 2016, an Order Approving Partial Non-Board Settlement Agreement issued.

On August 31, 2016, Respondent International Longshore and Warehouse Union (ILWU) filed a Motion for Reconsideration of the Order claiming previously unavailable information which required reconsideration of approval of the settlement agreement. Specifically, ILWU claims that the $2 million distribution of money to certain individuals and not to other individuals is arbitrary and exhibits favoritism.

Based upon internal Pacific Maritime Association documents, ILWU asserts that 13 of the 37 individuals who will receive $45,000 each were not hired by PAOH. ILWU further asserts that 2 individuals who never worked for PCMC or PAOH are targeted to receive approximately $14,743 each. Finally, ILWU requests that the Region determine and oversee the distributions to ensure that the funds are appropriately distributed.

By briefing of September 2 and 6, Charging Party IAM, the General Counsel, and Respondents PAOH, MTCH, and MTC argue that ILWU misperceives the remedy required for a finding of *Golden State* successorship. These parties urge that the distribution set forth in the partial non-Board settlement agreement is reasonable under the particular circumstances of this case. Thus, MTCH, PAOH, MTC argue that under *Golden State,* an employer may be held potentially liable to employees of its predecessor without having actually employed the individuals themselves.

Similarly, counsel for the General Counsel asserts that the 13 individuals cited by ILWU as arbitrarily included in the settlement disbursement were members of the IAM either as employees of single employers Pacific Marine Maintenance Co., LLC and PCMC or of Transbay Container Terminal (TBCT)[2] and suffered damages as a result of the original unfair labor practices found in *PCMC,* 362 NLRB No. 120 (June 17, 2015). As part of the current litigation, the General Counsel seeks damages for employees who worked in the historical IAM-represented unit whether they were employed by PMMC/PCMC, TraPac, TBCT, and/or PAOH over the entire *Golden State* remedy backpay period dating from 2005. Further, counsel notes that the 2 individuals who never worked for PCMC or PAOH would have been required to work as ILWU-represented employees had they accepted employment with PCMC and thus are properly included in the settlement agreement at reduced amounts.

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[1] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

[2] TBCT maintenance and repair employees at berths 25 and 26 were represented by IAM. When PAOH took over operation of these berths in 2011, the maintenance and repair employees were required to work as ILWU-represented employees.

IAM notes that some of the individuals who worked for PCMC were not hired by PAOH and found work elsewhere on the waterfront. Some of these individuals lost their competitive seniority rights when they found work at a disadvantage. IAM cautions that the amount of settlement money is small when compared to actual amount that might be owed.

Having given these arguments thorough re-consideration, the prior ruling is affirmed. This settlement, including amounts to the individuals targeted by ILWU, is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. Inclusion of the 15 targeted individuals in the settlement is not arbitrary or capricious but represents a reasonable method of distribution under the *Golden State* successor allegation.

SO ORDERED
September 7, 2016

Mary Miller Cracraft
Administrative Law Judge

Served by facsimile

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